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Wouter Druwé

Dignity and *Cessio Bonorum* in Early-Modern Dutch Learned Legal Literature

Dignity and *Cessio Bonorum* in Early-Modern Dutch Learned Legal Literature[1]

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Abstract

Imprisonment for debt was a common sanction in the early modern period. Through the learned legal institute of the cessio bonorum, or its customary legal alternatives, insolvent debtors could avoid the shame of prison. Nevertheless, in order to discourage irresponsible administration of one's patrimony, local customs and princely ordinances often added shaming sanctions to the ius commune institute. This contribution first presents the legal framework of the cessio bonorum, as well as some shaming practices, especially in the Low Countries. In its main part, this article analyses early modern Netherlandish learned legal literature on the cessio bonorum and outlines ten different arguments related to honour and dignity. Authors discussed which goods the ceding debtors were allowed to retain both at the moment of the cession and thereafter. On the one hand, fraudulent debtors did not deserve any humane treatment and, thus, neither the benefice of cession. For other classes of debtors on the other hand, like clerics, noblemen or members of the military, the obligations going along with the cession of goods were less severe. The arguments outlined in this paper also illustrate the entanglement of humanitarian and instrumental reasoning.

[1] This article is based on a paper I presented at the international conference 'Honour and the Law' in Leuven, 25 February 2015, which was organised at the occasion of the conferral of an honorary doctorate upon prof. dr. J. Whitman. I thank the organisers of the conference, prof. dr. M. Storme and prof. dr. W. Decock, for their kind invitation and support, and prof. dr. J. Whitman for his very stimulating remarks in response to my paper. I also thank prof. dr. L. Waelkens and prof. dr. S. Dusil, as well as the anonymous reviewer for their comments to an earlier draft of this paper, as well as all other participants and the public for their questions. All remaining errors are of course exclusively mine.

A. Introduction

Actuality – Syriza, the Greek left-wing party won the 2015 elections with the promise "*to restore the dignity of the Greek people*". The underlying presumption was that the austerity measures required by the creditors, had affected the dignity of the debtors, *i.e.* the Greek state and its people.[2] Such wording illustrates the importance of honour, pride and dignity in the debates on insolvency, even today. Of course, this was a particular case featuring a kind of collective debtor, but also at an individual level, argumentations of honour and dignity frequently pop up in insolvency law. Current Belgian law has, as a consequence of these evolutions, strongly played down the defamatory effects of bankruptcy and insolvency in general. Some goods can never be seized and this category of unseizable goods has been broadened over time: increasingly products which were once considered luxury products are now classified as unseizable.[3] Nevertheless, Belgian lawyers will still be accustomed to the imposition of professional bans on non-rehabilitated bankrupts.[4]

Long history – In the past, you did not make yourself popular, if you did not pay your debts either. Infamous is the well-known, but extremely contested and probably completely wrong interpretation of the Twelve Tables stating that creditors were allowed to cut their unwilling debtors in parts, an interpretation that was very common in early modern Europe. The description by Pierre Gudelin[5] (1550-1619) and the even more uncritical one by Theodoor van Tulden (d. 1645), two 17th-century law professors at the Leuven university, are only some examples.[6] Although, at that time, this practice had already been put to an end

[2] See, for instance: F. Coppola, "Syriza's Victory: Restoring the Dignity of Greece", 27 January 2015, http://www.forbes.com/sites/francescoppola/2015/01/27/syrizas-victory-restoring-the-dignity-of-greece/#28f5a0f13df9 (access: 30 August 2016).

[3] Art. 1408 Belgian Code of Civil Procedure (Gerechtelijk Wetboek/Code judiciaire). See for a short overview: P. Gielen, *La saisie mobilière*, Brussels, Larcier, 2011, p. 91.

[4] The Dutch term for 'non-rehabilitated' is 'niet in eer hersteld', 'eer' being the word for 'honour'. In fact, this expression could be literally translated as 'whose honour has not been restored'. See: Art. 3 K.B. nr. 22 van 24 oktober 1934 betreffende het rechterlijk verbod aan bepaalde veroordeelden en gefailleerden om bepaalde ambten, beroepen of werkzaamheden uit te oefenen, *BS* 27 oktober 1934, p. 5768.

[5] For more information on Gudelinus, see: M. Ahsmann, "Gudelinus (Goudelin), Petrus (1550-1619)" in M. Stolleis (*ed.*), *Juristen – ein biographisches Lexikon*, München, Verlag C.H. Beck, 2001, p. 261-262.

[6] P. Gudelinus, *Commentariorum de iure novissimo libri sex*, Antwerpen, Hieronymus Verdussius, 1620 (hereafter: Gudelinus, *Commentariorum*), liber IV, cap. XVI, p. 187: *Lex 12. tabularum debitorem condemnatum non tantum capi et vinciri, verum addici creditoribus permisit, et veluti in servitutem redigi; nempe ut tantisper serviret, dum aere alieno se liberasset. Ac quod crudele admodum erat, tandem debitorem capite poenam dare, aut venundari, et si plures forent creditores, corpus eius secari partirique concessit*. Nevertheless, Gudelinus immediately added, with reference to Aulus Gellius, that this provision was not used in practice: *teste Aulo Gellio lib. 20 cap. 1, ubi dicitur forte eo consilio tantam immunitatem lege denuntiatam fuisse, ne unquam ad eam perveniretur. Addici namque et vinciri multos visos, dissectum vero quenquam neque lectum neque auditum.* See also: D. Tuldenus, *Commentarius in Digesta sive Pandectas, Methodicus, Aetiologicus, Analogicus, Pragmaticus*, II, Leuven, Aegidii Denique, 1702 (hereafter: Tuldenus, *Commentarius* II), ad D. 42.3, p. 560, caput 1, nr. 1: *Contra eos qui obaerati, et non solvendo essent, varium, et per gradus ac intervalla lenius Romanis jus fuit. (i) Ex 12. tab. licuit creditoribus eos in compedibus habere ad operas exhibendas, sub imagine servitutis, qui nexi dicebantur; adeoque et in partes secare.*

– if it even had existed once[7] – still, late medieval and early modern debtors went through very harsh times. They lost their credit among their fellow villagers, colleagues and other merchants and could not borrow anymore. They were also expulsed by their religious community: excommunication has long been a canon law sanction for non-paying debtors, as Tyler Lange recently proved on the basis of 14th- till 16th-century Northern French archives of canon law courts.[8]

Inspiration for this paper – In 1996, Prof. John Whitman published an article on "The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence".[9] In that paper, Prof. Whitman wanted to renew the link between legal and moral history. He presumed a relation between the moral lessons of Roman law and the development of commerce, especially in the 17th-century Northern Netherlands, but with their beginnings in 16th-century Brabant already. Roman law offered some possibilities to normatively justify commercial activities and actions which were considered unacceptable by the then dominant Christian culture. To discover that precise link, Prof. Whitman did not focus on typical juridical literature, but instead on some practical handbooks with moral exhortations. Especially interesting was his contention that Roman law caused the Dutch to do away with the statutory defamatory sanctions in case of bankruptcy.[10]

Structure – This paper wants to critically assess the discourse on dignity in the field of early modern insolvency law and the cession of goods, with a special focus on Netherlandish learned legal literature. The focus will be on the legal technique of the *cessio bonorum*, the cession of goods. The concept is first defined and distinguished from other related figures. Afterwards, some shaming procedures of the *cessio bonorum* in different European regions will be discussed, with special attention to the Low Countries. In a third step, this contribu-

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[7] See, for a critical evaluation and alternative interpretation of this passage from the Twelve Tables: L. Waelkens, *Civium causa. Handboek Romeins recht*, Acco, Leuven, 2014, p. 46-47.

[8] T. Lange, "Credit in the Body of Christ (Northern France, 1300-1600)", LOEWE Research Focus "Extrajudicial and Judicial Conflict Resolution", *Arbeitspaper/Working Paper* nr. 10, urn:nbn:de:hebis:30:3-322609, 2013, 27 p.; T. Lange, *Excommunication for Debt in Late Medieval France. The Business of Salvation*, Cambridge, Cambridge University Press, 2016, 303 p. Nevertheless, on the basis of X. 3.23.3 (*Odoardus*) learned canonists distinguished between non-payment out of *contumacia* and non-payment out of impossibility. Excommunication was only possible in the first case. See: W. Forster, "'Et est casus singularis': Odoardus (X. 3.23.3) – ein mittelloser Kleriker und die Rechtsfolgen der Vermögensaufgabe" in D. von Mayenburg, O. Condorelli, F. Roumy and M. Schmoeckel (*eds.*), *Der Einfluss der Kanonistik auf die Europäische Rechtsordnung*, vol. 5: *Das Recht der Wirtschaft* [Norm und Struktur 37/1], Cologne, Böhlau, 2016 (hereafter: Forster, "Et est casus singularis"), (173) 176-177.

[9] J. Whitman, "The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence", *Yale Law Journal* 105 (1995-96) (hereafter: Whitman, "The Moral Menace"), p. 1841-1889.

[10] Whitman's thesis, however, was criticized by D. De ruysscher, "Reconciling Old and New: Imprisonment for Debts and *Cessio Bonorum*, in Antwerp and Mechelen (c. 1500-c. 1530)" in P. Oosterhuis and E. van Dongen (*eds.*), *European Traditions: Integration or Dis-Integration?*, Oisterwijk, Wolf Productions, 2012 (hereafter: De ruysscher, "Reconciling Old and New"), (35) 48, footnote 48. De ruysscher argued that *cessie van goede*, the first academic-local blend dating from before 1536, also entailed defamatory practices. Only afterwards would those defamatory practices have been given up. This issue is discussed in part C of this paper.

tion outlines ten different arguments on honour and dignity in the context of debates on insolvency, and – more specifically – *cessio bonorum*, which were raised by learned lawyers educated and/or active at Netherlandish universities. Finally, some concluding remarks will be offered.

B. *Cessio bonorum: quid?*

Definition and scope of application – Shaming sanctions are often brought into relation with the learned legal institute of *cessio bonorum* or cession of goods. Both the Justinian Codex and his Digest contain a separate title on *cessio bonorum*.[11] Walter Pakter describes it as "*the ancient ancestor and analogue of modern voluntary bankruptcy*". It went along with an exemption from further legal actions by other creditors and from personal execution. Someone who ceded his goods, did not lose his civil status and could retain a small portion of what he would acquire after the cession.[12] In *ius commune*, the *cessio bonorum* was essentially a legal means to get out of prison or to avoid being imprisoned for debt. As is well-known, the imprisonment of debtors in case of non-payment was a common practice in medieval and early modern Europe.

Some classes of people were excluded from such sanction anyway. Thus, some local statutes protected local burghers from imprisonment, except in case of flight, concealment of goods or absence.[13] According to *ius commune*, women could not be imprisoned for civil debts because of their being the weaker sex (*ob pudorem sexus*). On the basis of certain princely measures the nobility was protected from such a shaming treatment as well.[14]

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[11] Respectively: C. 7.71 (*Qui bonis cedere possunt*) and D. 42.3 (*De cessione bonorum*).

[12] W. Pakter, "The Mystery of 'Cessio Bonorum'", *Index: Quaderni camerti di studi romanistici* 22 (1994), (323) 323. See also on *cessio bonorum* in Antiquity: W. Pakter, "The Origins of Bankruptcy in Medieval Canon and Roman Law" in P. Linehan (*ed.*), *Proceedings of the Seventh International Congress of Medieval Canon Law*, Vatican City, Biblioteca apostolica vaticana, 1988 (hereafter: Pakter, "The Origins of Bankruptcy"), (485) 486-488.

[13] According to some local statutes, local burghers could in principle not be imprisoned. Exception was made in case of flight, concealment of goods or absence. See, for instance: rubr. 4 of the Coutume homologuée de la ville de Gand in A.E. Gheldolf (*ed.*), *Coutumes des pays et comté de Flandre*, vol. 1: *Coutume de la ville de Gand*, Brussels, Gobbaerts, 1868, p. 22-24, §13: *Gheen ghedyde, niet meer afzetene dan inwonende, en vermoghen eenen poortere of inwonende te doen vanghene, bezetten of arresteren binnen der stede ende scependomme om rauwe onbewettighe ende onghevrijlegierden schulden, ten ware in 't cas van afwoninghe, latitatie, absentatie ende vlucht.* The same was true for members of some privileged nations, see D. De ruysscher, "Bankruptcy, Insolvency and Debt Collection among Merchants in Antwerp (c. 1490 to c. 1540)" in T.M. Safley, *The History of Bankruptcy. Economic, social and cultural implications in early modern Europe*, Londen, Routledge, 2013 (hereafter: De ruysscher, "Bankruptcy"), (185) 196, footnote 12.

[14] See, among many others: P. Gudelinus, *Commentariorum*, liber IV, cap. XVI, p. 187: *Ac sunt personae quibus hoc concessum est, ne invite abstrahi includive possint: executione judicati dumtaxat in rebus earum permissa, veluti mulieres ob pudorem sexus. Indultum id et nobilibus personis, quorundam regnorum sanctionibus.*

Cessio bonorum was available to all non-fraudulent debtors, irrespective of their social origin or gender. In order to be freed from prison or in order not to be imprisoned, insolvent debtors listed their goods and renounced the administration of all goods in favour of their creditors. Criminal and tax debts were excluded. In criminal law, indeed, another principle prevailed: those who could not pay, would have to bear a physical punishment (*qui non habet in aere, luat in pelle/in cute/in corpore*).[15] Up to today, similar ideas are still present in Belgian law, albeit of course in an altered fashion. Those who do not pay their fines, will have to serve a prison sentence as a kind of substitution of the fine.[16]

Cessio bonorum did not involve the liberation of the debt.[17] Nevertheless, if the debtors concerned later thrived again, they were only obliged to pay to their previous creditors as much as they could afford.[18] A debtor who once ceded all his goods, was afterwards allowed to retain what he needed to buy his daily food[19], or, like the Council of Brabant formulated it in the early years of the 16th century, to live a "sober" life.[20] A 1544 ordinance by Charles V allowed the debtor after the *cessio bonorum* to retain one bed and one piece of every type of

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15 See for instance: H. Zoesius, *Commentarius ad Digestorum seu Pandectarum iuris civilis libros L*, Leuven, Hieronymus Nempaeus, 1656 (hereafter: Zoesius, *Commentarius ad Digestorum*), ad D. 42.3, p. 795, nr. 6: *Habet autem locum cessio in debito ex caussa civili, non etiam ex caussa criminali, in qua obtinet regula, Qui non habet in aere luat in pelle, et hoc, ne delicta maneant impunita.*

16 See: Art. 40 Belgian Criminal Code ('Strafwetboek'/'Code pénal').

17 *E.g.* (among many others): H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 795, nr. 9: *Unde patet, per cessionem non liberari cedentem a debito excurrente; sive inspicias jus civile, sive naturale; neque enim ille effectus ullibi invenitur attributus cessioni, cum debeat debitori sufficere liberatio a metu carceris, et quod in posterum non possit in plus conveniri, quam facere potest.* One was obliged to the debt, indeed, by reason of nature (*naturaliter*): H.J. Zoesius, *Commentarius in Codicem Justinianeum*, Venice, Nicolaus Pezzana, 1757 (hereafter: Zoesius, *Commentarius in Codicem*), ad C. 7.71, p. 490: *Dico conveniri, quia non liberatur a debito excurrenti, ad quod etiam naturaliter tenetur.*

18 See, for instance: P. Christinaeus, *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatarum decisiones*, vol. 1, Antwerp, Hieronymus Verdussius, 1626 (hereafter: Christinaeus, *Practicarum quaestionum*), *dec.* 228, p. 389, nr. 3: *(…) et sic haec cessio bonorum non fiat quam ut evitetur incarceratio neve debitores in carcere marcescant (…), et ut amplius ab aliis etiam creditoribus in carcerem detrudi non possit, nec postea cogi, nisi in quantum facere queat.* As foundation for this statement, reference was made to X. 3.23.3, *Odoardus*. In that decretal letter, pope Gregory IX (1229-1234) accorded an indefinite supplement of time to Odoardus, a clerical debtor who was unable to pay off his debts. Once he would come to better fortune, Odoardus remained bound to pay his creditors. For a recent discussion of this decretal and its consequences, see: W. Forster, "Et est casus singularis", 173-186.

19 See: A. Perezius, *Praelectiones in duodecim libros Codicis Iustinianei*, Amsterdam, Ludovicus and Daniel Elzevier, 1661 (hereafter: Perezius, *Praelectiones*), ad C. 7.71, p. 683, nr. 14: *Quomodo si quid misericordiae causa illi relictum fuerit, puta menstruum, vel legatum annuum alimentorum nomine, propter hoc non oportet bona ejus iterato venundari, nec enim fraudandus est alimentis quotidianis. (...) quomodo si res sit talis, ex qua vendita alere se posset cedens, et praeterea quid supersit, vendenda ea est, et quod supererit inter creditores distribuendum.*

20 D. De ruysscher, "Reconciling Old and New", (35) 43, with further reference to: Rijksarchief Anderlecht, Raad van Brabant, 6698, f. 2v. For the "turbe" De ruysscher refers to: Antwerps Stadsarchief, V, 68, f. 33-34.

non-valuable movables.[21] Gabriel Mudaeus (1500-1560), the leading Leuven legal academic in the mid-16th century, added that not every time the debtor acquired some trifling sum, he should be asked to deliver it immediately afterwards to his creditors. Indeed, that would not have been an efficient procedure. He thought the debtor should instead be accorded enough time in order to acquire a substantial patrimony before being sued again.[22]

Distinction with the procedure of 'abandonment' – *Cessio bonorum* should be distinguished from two other legal techniques: the customary 'abandonment of goods' and the treatment of fugitive debtors.

In the early 16th century, Mechelen and Antwerp applied a customary legal procedure of "abandonment of goods". It was quite similar to the *cessio bonorum*, but with some important differences. The liberation from prison in case of abandonment, was limited to public prisons, even though gradually some limitations on private imprisonment were imposed, as appears for instance from the 1546 Antwerp customary law.[23] From a current perspective, we could say that these limitations were inspired by the wish to promote a more humane treatment of the debtor:

> "*thus, the creditors were allowed to detain him, if they wish, as long as they house him under a closed shelter in a dry place and give him enough water and bread, and also sufficient straw to lay on. They may fetter him in as many irons as they think appropriate, but without hurting him.*"[24]

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[21] §36 Ordonnance (19 May 1544) impériale sur les lettres de rémission de crimes, d'ampliation, de légitimation, de placet, les banqueroutiers, les cessions de biens, les lettres de bénéfice d'inventaire, etc., in J. Lameere and H. Simont (*eds.*), *Recueil des ordonnances des Pays-Bas. Deuxième série – 1506-1700*, vol. 5, Brussels, Goemaere, 1910, p. 55-56: *Dat die voorschreven impetranten van brieven van cessie vercryghende andere goeden, sullen gehouden wesen die te consigneren ten behoeve van huere crediteuren; ende en sullen niet moghen behouden dan een bedde met sinen ghevolge, ende van elck stuck harffelycke goeden, een, behoudelyck dat si niet en sullen mogen hebben noch tinnewerck, noch silverwerck, noch andere meublen van waerden, ende tghene dat si meer hebben sullen, sullen si telcken reyse gehouden wesen te consigneren tot profyt van huere crediteuren, opte peyne te verliezen deffect van huere brieven van cessie*. Reference to this ordinance was made by: P. Peckius, *Tractatus de iure sistendi*, 247, cap. 45, nr. 19: *Quo modo et invictissimus olim Princeps noster Carolus V. August. anno 1541. die 28. Novembris statuit, cedenti bonis, nisi lectum unum cum suis ornamentis, item ex singulis rebus mobilibus non preciosis, unam esse duntaxat miserationis gratia relinquendam.* It is remarkable that Peckius did not use the terms *humanus*, *dignus* or similar. Peckius was quoted by: H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 796, nr. 15.

[22] G. Mudaeus, *De contractibus quatuor Digestorum tituli (…) publicis praelectionibus enarrati (…)*, Frankfurt-am-Main, Sigismund Feyerabend, 1586 (hereafter: Mudaeus, *De contractibus*), III, § *Cum eo quoque*, p. 640, nr. 4: *Recte quidem id additum est, nam non statim, simulatque vel pusillum adiectum est, id iterum distrahendum est, et dividendum in singulos creditores, quibus minus prosit tantillae rei adiectio, quam noceat debitori detractio, sed sinendum est, ut coalescere possint facultates eius, ut tandem aliquando commodius solvat singulis solidum (…)*.

[23] D. De ruysscher, "Reconciling Old and New", (35) 36-38.

[24] *Consuetudines antiquissimae*, tit. XV, §2 in G. De Longé (*ed.*), *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, Brussel, Gobbaerts, 1870, 370: *(…) de debiteur soude van dan voortane ontslaghen syn vander hachten daer inne hy geseten hadde; dies soe souden de crediteuren hem moeghen selve aenveerden ende gevanghen houden, nae heurder belieften, settende den selven boven der eerden onder tdack, dichte ende drooghe, ghevende hem waters ende broots genoch, ende oick stroos genoch om op te liggene, doende hem ane (tusschen knyen ende knoesselen) soe vele ysers als hem goedt dochte, sonder seer oft wee te doene;*

De ruysscher established that gradually this technique of 'abandonment' evolved in both cities towards the procedure known as 'cessie van goede', a local adaptation of the learned legal institute of *cessio bonorum*. The beginnings of this evolution could already be found in Antwerp archival documents of June 1505. It had been confirmed by a "turbe" in 1520.[25] A royal ordinance of 30 August 1536[26] changed the procedure of 'cessie van goede' and required royal intervention.[27] Nevertheless, the Antwerp 1546 customary law still stressed that the debtor first had to be imprisoned for six weeks at the local public prison.[28]

Difference with the treatment of *fugitivi* – Apart from the "abandonment", the *cessio bonorum* should also be distinguished from the imprisonment of suspicious debtors in case there was a danger that they would flee. That imprisonment could only take place if the debt was immediately due and if the creditor swore that there was indeed an imminent danger that the debtor would flee.[29] Debtors could free themselves by offering securities in order to

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in sulcker vueghen nochtans dat syne vrienden, maghen ende andere hem altyt binnen sonneschyne mochten begaen ende bestaen.

25 D. De ruysscher, "Reconciling Old and New", (35) 47.

26 D. De ruysscher, "Reconciling Old and New", (35) 47. According to De ruysscher, this royal ordinance also limited the right of creditors to oppose themselves against such a royal letter of cession to formal arguments. However, the 1536 ordinance does not seem to impose such a conclusion. See: §4 Ordinantie (30 August 1536) aengaende de cessionarissen by Carolus Quintus geordineert ende gestatuueert, in G. De Longé (*ed.*), *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, Brussel, Gobbaerts, 1870, p. 722: *Ende in gevalle yemant vanden crediteuren oft andere hem teghen de voorscrevene opene brieven van cessien by den voorscreven impetrant verworven wilt opponeren, zoo sullen die wethouderen ofte rechteren vanden cessien gehouden zyn sommeerlycken daer inne te procederen, sonder treyn ofte forme van processe, zoo dat de saecke van interinemente binnen den tyt van vier maenden sal moeghen beslicht zyn (…).* The ordinance can also be found in: M.J. Lameere (*ed.*), *Recueil des ordonnances des Pays-Bas. Deuxième série – 1506-1700*, vol. 3, Brussels, Goemaere, 1902, p. 549-550.

27 Such intervention of a public authority remained important, also in the Republic of the United Provinces, even though the competence was now given to the local authorities. See, for instance: S. van Groenewegen van der Made, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus*, Leyden, David Lopez de Haro and Franciscus Moyardus, 1649 (hereafter: S. van Groenewegen van der Made, *Tractatus de legibus*), ad C. 7.71.6, p. 663: *Hodie non sola voluntatis professione fit bonorum cessio, sed supplici libello a suprema Curia impetratur cessionis mandatum sive diploma (…), quod ab ordinario debitoris judice, aut si in pago habitet debitor, a proximae urbis judice, praesente debitore et vocatis creditoribus solemniter comprobatur, vulgo interinatur, si preces veritate nitantur.*

28 *Consuetudines antiquissimae*, tit. XV, §1 in G. De Longé (*ed.*), *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, Brussel, Gobbaerts, 1870, 368 : *Item, naeder stadt recht en pleghe [plach] nyemant cessie te moeghen doene hy en moeste yerst vj weken lanck opden Steen voer syn schult gevangen geseten hebben ende daer nae moeste hy alle de crediteuren doen daghen om hem cessie te comen syen doene, ende syne goeden te aenveerdene*. In practice, often, this guideline was not respected: D. De ruysscher, "Bankruptcy", (185) 189.

29 A. Gaill, *Practicarum observationum tam ad processum iudiciarium, praesertim Imperialis Camerae, quam causarum decisiones pertinentium libri duo*, Cologne, apud viduae Arnoldi Hierati, 1645 (hereafter: Gaill, *Practicarum observationum*), *Lib.* II, *Obs.* XLIV, p. 367-368, nrs. 6-7: *Secundo requiritur, ut debitum sit certum et liquidum, ex chirographo debitoris, vel instrumento publico, aut testibus probatum (…) Tertio requiritur, ut iuramento creditoris suspicio fugae verisimilibus coniecturis recte probatur (…)*. At the same time, Gaill remarks that this practice went on *ad simplicem creditoris petitionem*, especially vis-à-vis strangers (*extraneis* or *advenis*).

ensure their presence at the legal procedure (*cautio iudicio sisti*) and/or to ensure the payment of the sum due (*cautio iudicatum solvi*).[30] In those cases, the status of a person in the early modern society mattered a lot. According to the Leuven law professor Peter Peck the Elder[31] (1529-1589), a judge was allowed to simply take people of higher status at their word.[32]

Before being released, *fugitivi* could also be forced to pay for their accommodation. Johannes Van den Sande[33] (1568-1638), a professor at the Frisian university of Franeker, argued that the prisoner should not complain, because at home, he would even have had to spend more.[34] Little by little, the word *fugitivi* would get a wider significance and even become synonymous for insolvent debtors.[35]

C. Shaming practices in the field of *cessio bonorum*

Cessio Bonorum and *infamia* – Often, the early modern *cessio bonorum* was accompanied by shaming practices, which were not imposed by the learned law of the *ius commune*, but

[30] *E.g.*: Title 4, §1 Coutumes de la seigneurie du Kiel in G. de Longé (*ed.*), *Coutumes du Pays et Duché de Brabant. Quartier d'Anvers*, vol. 5: *Coutumes du Kiel, de Deurne et de Lierre*, Brussels, Gobbaerts, 1875, p. 28-30: *Item, in den iersten, dat soo wanneer eenighe inghesetene der voorscreve heerlijckheijt bevindt binnen der selver sijnen debiteur oft sijns debiteurs goeden van buijten, mach de selve alhier bij den officier doen arresteren, ende alsoo voor sijn crediet in rechte betrecken; ende en vermach de gearresteerde buijten de heerlijckheijt hem noch sijne goeden niet absenteren, ten waere hij alvore den arrestant voor sijn crediet alhier cautie sufficient en hadde gestelt, van hem te rechte te staene ende tgewijsde te voldoene, of dat andersints schepenen, considereerende de gelegenheijt van der saecken, ordonnerende dat hy gestaen soude met cautie juratoir ende sijnen eede.* A similar provision could be found in Title 4, §1 Coutumes de Deurne, *Ibidem*, p. 94.

[31] For a short biography, see: P.J. Blok en P.C. Molhuysen, "Peck, Petrus", *Nieuw Nederlandsch biografisch woordenboek* 9 (1933), www.dbnl.org.

[32] P. Peckius, *Tractatus de iure sistendi, et manuum iniectione, quam vulgo arrestationem vocant*, Keulen, Johannes Kinckius, 1631 (hereafter: Peckius, *Tractatus de iure sistendi*), p. 242, caput 42, nr. 10: *Nisi tamen is qui arrestatus sit, est egregia persona, aut multum nobilis, cuius iuramento stari possit; nam et alias regulare est quod istiusmodi personis civitas pro carcere detur, fideique illorum credatur, et iudex hoc faciens, nulla ratione culpari potest, etiamsi statutum, aut lex de debitore in carcerem coniiciendo loquatur.*

[33] For a short biography, see: R. Visscher, "Sande (Johan van den)" in P.C. Molhuysen and P.J. Blok (*eds.*), *Nieuw Nederlandsch Biografisch Woordenboek*, part 4, Sijthoff's Uitgevers-Maatschappij, 1918, col. 1199-1200.

[34] For a Frisian example of 1610: J. Van den Sande, *Decisiones frisicae sive rerum in suprema Frisiorum Curia iudicatarum libri V*, Leeuwarden, Johannes Jansonius, 1639, lib. I, tit. 17, def. 2, p. 63: *Nec debite arrestatus relaxandus est, antequam solverit sumptus alimentorum, quia se ipsum exhibere et alere tenetur (…). Commentariensis debitorem arrestatum pro expensis vel alimentis retinere potest, quia ex his nutritus et alitus est, et forte domi suae tantum vel amplius expendisset.*

[35] D. De ruysscher, "Designing the limits of creditworthiness. Insolvency in Antwerp bankruptcy legislation and practice (16th-17th centuries)", *Tijdschrift voor Rechtsgeschiedenis* 76 (2008) (hereafter: De ruysscher, "Designing the limits"), (307) 313, who remarked a similar – albeit prudent – evolution in the Antwerp ordinances of 1516 and 1518.

instead by local statutes.[36] The *ius commune* even stressed that *cessio bonorum* did not imply infamy, the loss of civil status. *Cessio* could in principle take place in an extrajudicial fashion and without any formalities, even by letters or proctors.[37] Nevertheless, the learned literature did receive a distinction between the *infamia juris* and the *infamia facti*. This distinction had its origins in medieval canon law.[38] As a matter of principle, *cessio bonorum* did not imply an *infamia juris*, even though the 1548 Antwerp customs still mentioned the loss of civil status as one of the consequences of a 'cessie van goede', the local-academic blend.[39] *Infamia facti* was, however, very often linked to this practice of cession of goods. It entailed indeed a certain sense of shame (*pudor*) and scoffing (*ignominia*).[40]

Shame sanctions elsewhere – Joos de Damhouder (1507-1581), a 16th-century Bruges lawyer, who had studied at the Leuven law faculty in the 1520s, was aware of shaming practices being linked to the cession of goods elsewhere. For instance, he referred to Art. 70 of the ordinance of Lyons which had been enacted by Louis XII in 1510. It required a bareheaded appearance in court, even without wearing a belt.[41] In France, it was a common practice to

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[36] Even some medieval authors, like Jacques de Révigny (ca. 1230-1296) and Odofredus of Bologna (d. 1265), had distinguished between Roman law and the shaming sanctions of local statutes. See: W. Pakter, "The Origins of Bankruptcy", (485) 489.

[37] It was already mentioned in a fragment by Marcianus: D. 42.3.9: *Bonis cedi non tantum in iure, sed etiam extra ius potest. Et sufficit et per nuntium vel per epistolam id declarari.* It was frequently repeated in Netherlandish learned legal literature, for instance: J. De Damhouder, *Practijcke in civile saecken*, Rotterdam, Pieter van Waesberge, 1649 (hereafter: De Damhouder, *Practijcke*), cap. 70, p. 149, nr. 14: *De voorseyde Cessie mach oock niet alleen in Iudicio, maer oock extra Iudicium gheschieden, ende 't is genoech, datse, of door een Bode, of door een brief verklaert werdt, voornemelijck als de voorseyde drie conditien onderhouden worden, namentlijck, ofte door den persoon selfs, ofte door sijnen Procureur (…).* See also: H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 794-795, nr. 1: *(…) sufficit nuda professio, et sola vox, (…) etiam ejus, qui non est conventus, cum et extra judicium fiat cessio (…).*

[38] See: P. Landau, *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa ordinaria* [Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 5], Cologne, Böhlau, 1966.

[39] *Consuetudines antiquissimae*, titel 15, §3, in: G. De Longé (*ed.*), *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, Brussels, Gobbaerts, 1870, 370: *Item, een die cessie gedaen heeft verliest syn poorterie; maer is hy in een ambacht, dat mach hy noch bliven doende, om syn broot te winnene, sonder anderssins hem metten poorters rechte te moeghen behelpene.* A similar rule also existed in the 1535 customary law of Mechelen. See: Title 21, §1 Coutumes de la ville de Malines in G. de Longé (*ed.*), *Coutumes de la ville de Malines*, vol. 1, Brussels, Gobbaerts, 1879, p. 158: *Een portere oft inghesetene van Mechelen, presenterende in rechte te doen cessie van goede, verliest terstont zijn porterie ende verbuert alle privilegien ende vrijheyden den porters oft inghesetenen van Mechelen verleent, behoudelijck dat hy zijn ambacht mach blijven doende ghelijck een portere.*

[40] D. Tuldenus, *Commentarius* II, ad D. 42.3, p. 561, caput 1, nr. 5: *Quamvis autem Cessio bonorum non irrogat infamiam juris (…), pudorem tamen perstringit, et aliquam ignominiam adfert, quam Facti infamiam vocant.*

[41] J. De Damhouder, *Practijcke*, cap. 70, p. 149: *In Vranckrijck autem en wordt niemandt by Procureur, Bode, ofte Brieven tot de Cessie geadmitteert, maer moet den Cessionant selfs in persoon die Cessie publijckelijck in Judicio doen, ontgort, ende met blooten hoofde, ende dat tot sijne groote schande ende infami.* Art. 70 of that 1510 ordinance by Louis XII was quoted by Jacques Savary, *Le parfait négociant*, Paris, Jean Guignard fils, 1675, II, p. 308: *Pour ce que plusieurs marchands, et autres ne craignant à faire cession de biens, parce qu'ils y sont receus par Procureurs ou en lieux secrets, nous ordonnons que doresnavant nul ne soit receu à faire ladite cession de biens par Procureurs, ains se fera en personne, et en jugement durant l'audience desceint, et teste nuë.*

oblige ceding debtors to wear a green bonnet.[42] Joos de Damhouder also mentioned the still more shaming sanctions in Northern Italy. Some local statutes required insolvent debtors, for instance, to sit with their naked backside on the marble lion before the entrance gate of the capitol.[43] Shame sanctions existed in German cities too. An Augsburg city ordinance of 1580, for instance, cast out insolvent merchants from the well-off milieus. They were not allowed anymore to appear at gatherings of honest people. At marriages and funerals, they had to sit amongst the women and their children were not allowed to wear golden necklaces.[44]

Shame sanctions in the Low Countries – In the Low Countries, both legal literature and practice contain contradictory indications. Joos de Damhouder condemned too severe an attitude towards insolvent debtors. Someone who didn't show mercy to these unfortunate people, was not a real human being. Didn't Christ our Lord show us that we should always care for the least of our brothers instead of further disheartening them?[45]

By the time de Damhouder wrote his comments, to his satisfaction in Brabant shame sanctions had been abolished for non-fraudulent debtors.[46] The aforementioned 1536 ordinance by Charles V distinguished indeed between scandalous and non-scandalous cession. The first variant was to be applied to a fraudulent debtor whom the creditor did not want to imprison. Non-fraudulent debtors could however enjoy the non-scandalous alternative.[47] Some people

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[42] See, with further references: P. Zambrana Moral, "Histoire de six articles du Code civil français: les droits du débiteur, honneur et contrainte par corps", *Revue historique de droit français et étranger* 82/4 (2004), (589) 594-595.

[43] J. De Damhouder, *Practijcke*, cap. 70, p. 149: *Want daer zijnder die seggen, dat alle Cessie moet geschieden door eenige infame ende verachtelijcke acte, volghende de form van 't statuyt, ghelijck als die uyt-druckelijck gestelt werdt in 't Capittel de regula Leoni danda, dat is, van met sijn blooten aers te gaen sitten op den marmeren Leeuw, voor de deur van 't Capitolium.*

[44] M. Häberlein, "Merchants' bankruptcies, economic development and social relations in German cities during the long 16th century" in T.M. Safley, *The History of Bankruptcy. Economic, social and cultural implications in early modern Europe*, Londen, Routledge, 2013, (19) 26.

[45] J. De Damhouder, *Practijcke*, cap. 70, p. 146-147: *Seeckerlijck 't is grootelijcks te beklaghen, dat men over al menschen vindt die maer noopende den tijtel menschen zijn als daer ghy nauwelijcks yet menschelijcks in en vindt als den tijtel ende de gedaente die soo onmenschelijck ende soo hart zijn dat se met gheen menschelijcke affecten ofte eenich medelijden over 't ongeluck van haer even-naeste geraeckt en werden, soo dat inghevalle sy een schuldenaer hebben, die haer om eenighe quade fortuyn niet en kan betalen, dien doen sy dadelijck sonder eenich medelijden in 't Ghevangen-huys werpen, hem daer veel liever latende vergaen ende in vuyligheydt ende verdriet sterven als dat se met mede-lijden beweecht zijnde denselven soude los laten en de schult quijt schelden ende haren armen broeder in Christo 's levens vryheydt weder geven daer sy nochtans weten dat dien schuldenaer niet door sijn eygen schuldt slofheydt of prodigaliteyt in soodanigen schult geraeckt is, maer door de wil en dispositie Gods*.

[46] J. De Damhouder, *Practijcke*, cap. 70, p. 149: *Dese niet heel ongelijcke, ende andere infame manieren placht men eer-tijds hier in dese onse Landen oock, in materie van Cessie, te observeren, die vele van de verachte cessie afkeerich maeckten. Maer naer dat dusdanige infame solemniteyten op-gehouden hebben (…).*

[47] See: §6 Ordinantie (30 August 1536) aengaende de cessionarissen by Carolus Quintus geordineert ende gestatuueert, in G. De Longé (*ed.*), *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, Brussel, Gobbaerts, 1870, p. 724: "*Die ghene die by quaede fortuyne, onnoselick oft by inconvenienten tot armoeden sullen zyn gecoemen, als by tempeesten van der zee, brande, berovinghe van den vianden, ende ruyminghe van hueren crediteuren, oft alderhande onnosele saecken ende middelen, ende van ons brieven van cessien geobtineert hebben, sullen d'effect van den selven brieven genyeten ende gebruycken, sonder diffamie*

even started to consider *cessio bonorum* as an honour, more than as a shame.[48] Nevertheless, just like Louis XII, Charles V also ordered in an ordinance dating from 20 October 1541 that all applicants should still appear in person, bareheaded and without belt.[49]

Opposing signals: city statutes in the North – This apparently more lenient approach should be nuanced. Some – especially Northern Dutch – documents seem to imply a strengthening of the rules on *cessio bonorum*. On 30 July 1501, for instance, Philip the Fair promulgated a statute as a response to the complaints of Leyden citizens. They were apparently shocked by insolvent debtors, who even after a *cessio bonorum*, kept behaving themselves like the wealthy, showing off, wearing beautiful and colourful cloths and even daily continuing their trades as usual. Therefore, Philip decided to add some shame sanctions to prevent such misconduct. As of that moment, insolvent debtors who wanted to cede their goods had to stay for three consecutive days during one hour, from half past 11 to half past 12, in their underwear on the steps before the town hall.[50] From a letter of Maurits of Nassau,

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oft ignominie te lydene, oft hem aengedaen te wordden, behoudelicken alleenlycken dat huere brieven van cessie sullen openbaerlick in huere presentie vercondicht ende gepubliceert wordden ter plaetsen daermen gewoonlijcken is publicatie te doene, ende dat al, by maniere van provisie ende totter tyt toe anders by ons daer op sal zijn geordineert."

48 J. de Damhouder, *Practijcke*, cap. 70, p. 149: *Maer naer dat dusdanige infame solemniteyten op-gehouden hebben zijnder weynich gheweest die van sulcke cessien schrick gehadt hebben, jae (Godt betert) 't is soo verre gekomen dat vele met de cessie spotten ende haer de selve meer tot eer, als tot schanden toe-reeckenen: waer van ick hier veel exempelen soude konnen stellen, doch ick gae voorts tot andere dingen.* Whitman also described this comment in his aforementioned article: J. Whitman, "The Moral Menace", (1841) 1878.

49 Ordonnance (20 October 1541) impériale sur les poursuites criminelles, les lettres de rémission, de légitimation, de placet, de répit, de cession de biens et de bénéfice d'inventaire, in J. Lameere and H. Simont (*eds.*), *Recueil des ordonnances des Pays-Bas. Deuxième série – 1506-1700*, vol. 4, Brussels, Goemaere, 1907, p. 328: *Que tous impétrans de cession seront tenuz de présenter leurs lettres en jugement endedens le mois de l'impetracion, avec l'estat de tous leurs biens, et iceulx habandonner à leurs crediteurs, sans en retenir la manyance, et affermer le dict estat par serment, requerir l'interinement de leursdictes lettres, deschaintz et à teste nue, en personne et non par procureur.* This constitution was very often referred to in learned legal literature: P. Gudelinus, *Commentariorum*, liber IV, cap. XVI, p. 187: *(…) quinetiam singulare est moribus, ut diploma Principis cessionis faciendae caussa impetrari necesse sit; idque solemniter in judicio comprobari, de quo tenemus in his regionibus Caroli Quinti piae memoriae, constitutionem, licet jure Romano sufficeret sola voluntatis professio, possetque cessio etiam extra judicium fieri; et per nuntium vel epistolam.* See also: A. Perezius, *Praelectiones*, ad C. 7.71, p. 682, nr. 2: *Extat enim in hisce Belgicis provinciis constitutio Caroli V Imperatoris anno 1541 lata, quae vult, ut diploma principis cessionis faciendae causa, ab egeno debitore prius impetretur, idque solenniter in judicio comprobetur. In Gallia vero sufficit ut debitor discinctus, apertoque capite, profiteatur se non esse solvendo in judicio, sedente judice pro tribunali, die et tempore quo publice causae agitantur.* See as well: D. Tuldenus, *Commentarius* II, ad D. 42.3, p. 561-562, caput 2, nr. 1: *(…) edictum est 20. Octob. 1541 ut generaliter quicunque est cessurus bonis non tantum obtineat id Rescripto Principis (…), sed et intra mensem Rescriptum Judici cominus ipse nudato capite et discinctus ritu ex antiquitate repetito offerat approbandum, exhibens juratum bonorum indicem, quorum possessionem creditoribus dimittat.*

50 Octroy (30 July 1501) van den Aardshertog aan die van Leyden vergund dat de Cessionanten drie dage voor 't Stadhuis zullen ten toon staan, in F. Van Mieris, *Bundel van Handvesten, Privilegiën en Octroyen, Rechten en Vryheden midsgaders Ordonnantiën, Resolutiën, Plakkaaten, Verbintenissen, Costumen, Instructiën, en Handelingen der Stad Leyden*, Leiden, Abraham Kallewier, 1759, p. 193-194: *(…) sy en sullen eerst ende alvoren gehouden wesen, corts na de interinatie van dien te koomen in onse voorschreve stede van Leiden, ende voor 't stadhuys aldaer te stane in hoir onderste kleed, drie daegen achter een volgende, op een plaetse hoogh*

the stadtholder of the Republic of the Seven United Provinces, dating from 15 July 1622, it appears these shame sanctions were still applicable.[51] Therefore, Simon van Leeuwen's 1666 statement that such sanctions had never been applied within the city of Leyden, might not be extendable beyond his own lifetime.[52]

D. Dignity and *cessio bonorum* in Dutch learned legal literature

Framework – So far, an overview was given of the legal nature of a *cessio bonorum* and its customary alternatives and adaptations, as well as of the shame sanctions which often went along with it. In what follows, attention will turn to arguments concerning dignity and honour which could be derived from an analysis of 16th- and 17th-century learned literature on the topic of *cessio bonorum*, especially by authors who had studied and/or worked at Netherlandish universities. Ten such arguments will be presented. The following discussion is not meant to be chronological, nor exhaustive, but tries to sketch different ways in which considerations of dignity and similar ideas were invoked in the legal debates on insolvency.

Argument 1: *Cessio bonorum* as a benefice to prevent from being thrown into the defamatory prison – Interestingly, the nature of the cession of goods as a benefice was strongly emphasized. This measure originated from compassion and commiseration.[53] At first sight,

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synde drie ofte vier trappen, elcken dach een uyre, te weten van half twaelven tot half een uyre op de middach, op paene van te vervallen 't effect van heure voorschreve brieven van cessie. A similar provision was also enacted with respect to the city of Rotterdam. See, for a learned legal reference to both sources: S. van Leeuwen, *Het Rooms-Hollands-Regt* …, Amsterdam, Boom Bockverkopers, 1708, boek 4, deel 41, p. 492, nr. 3: *Gelijk als tot Leyden en Rotterdam, alwaar geen Boedel afstand geschieden mag, ten zy dat den Versoeker korts na de gestading van dien komt staan voor het Stadhuis in sijn onderste klederen, drie dagen achter een volgende, op een plaatse hoog zijnde drie of vier trappen, elke dag een uyr, te weten, van half twaalf, tot half een uyre op de middag; Octroy voor die van Leyden den 30. Juli 1501 en voor die van Rotterdam verleent in den Jare 1519.*

[51] M. van Nassau, "Bewyzen, dat de Burgers van Leyden, en de Inwooners van Rynland hunne brieven van Cessie moeten doen interineren voor den Gerechte te Leyden", 15 July 1622 in F. Van Mieris, *Bundel van Handvesten, Privilegiën en Octroyen, Rechten en Vryheden midsgaders Ordonnantiën, Resolutiën, Plakkaaten, Verbintenissen, Costumen, Instructiën, en Handelingen der Stad Leyden*, Leiden, Abraham Kallewier, 1759, p. 194-195.

[52] S. van Leeuwen, *Manier van procedeeren in civile en crimineele saaken*, Amsterdam, Jan Boom, 1711, tit. 28, p. 102: *Dog is 't selve binnen de Stede Leyden, mijns wetens, noyt geschied, maar moeten aldaar die geene die om schuld gevangen geset werden, soo lang blijven sitten, tot dat het de Schuldeyschers selfs moede werden, het welk men noemt, door de Tralie eeten.* Simon van Leeuwen lived from 1626 to 1682. The first edition of this book dates from 1666. Reference to this statement is also made by: J. Whitman, "The Moral Menace", (1841) 1879.

[53] Those who could invoke the *cessio bonorum*, would later be considered *personae miserabiles*. The Church tribunals claimed, for this category of people, a subsidiary competence, if the worldly tribunals neglected their task (*negligentia*), at least according to Oldendorp (1559). See, with further references: T. Duve, *Sonderrecht in der Frühen Neuzeit. Studien zum* ius singulare *und den* privilegia miserabilium personarum, senum *und* indorum *in Alter und Neuer Welt*, Frankfurt-am-Main, Vittorio Klostermann, 2008, 73, footnote 183.

this measure's primary aim was to preserve the dignity, not to shame the debtor.[54] Andreas Gaill (1526-1587), who studied one year at the Leuven university before becoming one of the Holy Roman Empire's most distinguished 16th-century jurists, defined a stay in prison as a great dishonour, yes, even as a kind of torture and testing.[55] The damage to one's reputation was enormous.[56]

In a *decisio* from 1580, Cornelis van Nieustad (Neostadius, 1549-1606)[57] described, as it was common among learned jurists at that time, the *cessio bonorum* as a *flebile et miserabile beneficium*. Its aim was to prevent the already denuded debtors from additionally being thrown in the defamatory prison.[58] The Leuven law professor Hendrik Zoes (1571-1627) added that it would indeed be inhuman to again condemn someone who already saw his fortune evaporate into thin air.[59] Although according to a 1579 Holland decision letters of cession could not be granted anymore after the condemnation had become final, Neostadius was convinced that even then, this benefice of cession of goods should still be accorded to those debtors who had become poor beyond their fault.[60]

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54 See, for instance: H. Donellus, *Donellus enucleatus, sive commentarii (...) de iure civili in compendium ita redacti, ut verum nucleum contineant, ...*, Antwerp, apud Petrum Bellerum, 1642, lib. 27, cap. 9, p. 427: *Bonis cedere neutiquam turpe, quin pro summo beneficio res tributum.*

55 A. Gaill, *Practicarum observationum*, lib. I, obs. XXVI, p. 45 (in fact: 50), nr. 10: *Quod supra dictum est, carcerem de iure civili non esse poenam illud verum est, respectu causae finalis; quia carcer de iure civili non ad vindictam, sed tantum ad custodiam habetur (…); secus tamen est quo ad materiam, hoc est, ipsum carceratum, cui carcer saepe magnum est tormentum, et supplicium, cum sit sordida et infamis mansio (…).*

56 D. De ruysscher, "Bankruptcy", (185) 189. Merchants who didn't frequent the Antwerp fair, lost their credibility and creditworthiness. See also: D. De ruysscher, "Designing the limits", (307) 318. In 1556, the German counsel Laurentius Kirchoff (d. 1580) considered this reputational damage to be irreversible, and therefore warned against unjust imprisonments. See: L. Kirchovius, *Consiliorum seu responsorum iuris (…) volumen II*, Frankfurt, Johannes Saurius, 1605, cons. 11, p. 46, nr. 7-8: *Metus enim infamiae maior est quam metus mortis (…) quod et locum habet, non solum quando periculum infamiae est de praesenti, sed etiam si sit futurum (…) unde dictum tritum: Melius est non vivere, quam turpiter et cum ignominia vivere.*

57 Cornelis Mathiasz van Nieustad was the first law professor at the Leyden university. In 1602, he became the presiding counsellor of the High Council of Holland and Zeeland. See, for a short biblio-biographic overview: A.J. van der Aa, K.J.R. van Harderwijk and G.D.J. Schotel (*eds.*), *Biographisch woordenboek der Nederlanden*, vol. 13, Haarlem, J.J. Van Brederode, 1868, p. 126.

58 C. Neostadius, *Utriusque Hollandiae, Zelandiae, Frisiaeque, Curiae Decisiones*, 's Gravenhage, Joannes and Daniel Steucker, 1667, *decisio curiae Hollandiae* 41, p. 112: *(…) quod flebile et miserabile beneficium cessionis nemini esset denegandum, nisi expresse de dolo cedentis appareat, immers 't selve bewijsende, niet en konde gepraejudiceert zijn: nademaal d'Impetrant tot allen tijden wederom moest komen tot vermaninge, etc.* Matthaeus Brunus wrote this also in his influential treatise on the cession of goods: W. Forster, *Konkurs als Verfahren. Francisco Salgado de Somoza in der Geschichte des Insolvenzrechts*, Böhlau, Keulen, 2009 (hereafter: Forster, *Konkurs als Verfahren*), 190.

59 H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 796, nr. 11: *(…) quod scilicet inhumanum sit, spoliatum fortunis suis in solidum iterum damnari.*

60 C. Neostadius, *Utriusque Hollandiae, Zelandiae, Frisiaeque, Curiae Decisiones*, 's Gravenhage, Joannes and Daniel Steucker, 1667, *decisio curiae Hollandiae* 53, p. 122: *Cessie-brieven en grijpen geene plaatze, tegens Sententien, gegaan in kragte van Gewijsde. (…) Quod verum puto, si debitor, sonder sijn schult, tot armoede gekomen is.*

As a *miserabile beneficium*, a cession of goods also offered the debtor the possibility to restart his trade (even though he was not liberated from his previous debts). Indeed, a ceding debtor retained his civil status. Thus, Gabriel Mudaeus offers an interesting remark in his commentary to the title *Pro Socio* of the Digest of Justinian. A *cessio bonorum* by a partner caused the end and the division of the partnership. He could, however, restart with a new *societas* later.[61] The problem, here, would probably be of a more factual nature: would there still be someone who had enough trust in him to give him credit?

However, not everyone was entitled to the benefice. Those who had caused their own insolvency, did not deserve the benefice of cession of goods.[62] Unworthy for that reason were also all those who were led by malignancy, maleficence or the like[63], or those who had secretly sold their goods.[64]

Argument 2: Relaxation of obligations because of status or dignity – Secondly, given their special status in early modern society, for some categories of debtors the obligations which went along with a cession of goods were mitigated. For instance, exception was made for military men and clerics, respectively the soldiers of the worldly and the heavenly army. Hendrik Zoes said they only had to cede what they could miss (*executionem non patitur ultra quam facere potest*).[65] Indeed, as Antonio Perez (1583-1672)[66], another 17th-century Leuven law professor, added: if soldiers would be forced to cede all their goods, they would in fact be

61 G. Mudaeus, *Commentarii ad Titulos Digestorum pro Socio; de contrahenda emptione et venditione, de actionibus empti et venditi, de pignoribus et hypothecis*, Leuven, 1563, I, p. 56, § *Item bonis a credito*: *Poterit tamen qui huiusmodi bonorum venditionem passus est, cum retineat non libertatem tantum, sed et civitatem, novam cum quibuslibet inire societatem.*

62 *E.g.*: G. Mudaeus, *De contractibus*, III, § *Cum eo quoque*, p. 640, nr. 1: *Recte sic generaliter, quisquis is fuerit, nam cedere bonis, cuicunque licet, etiam debitori publico (…) dummodo tamen, non suo vitio decoxerint.* A. Perezius, *Praelectiones*, ad C. 7.71, p. 682, nr. 8: *Frustra insuper ad cessionis beneficium confugiunt, qui prodige et luxuriose bona sua consumpserunt, non enim sunt digni commiseratione, qui sua turpitudine causarunt sibi inopiam: multo minus illi qui alios spoliarunt, quippe indigni beneficio legis, qui contra leges faciunt; nec enim maleficium debet causare beneficium.* The Italian jurist Matthaeus Brunus considered all insolvent merchants as fraudulent ones: W. Forster, *Konkurs als Verfahren*, 187.

63 H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 796, nr. 13: *Secundo requiritur, ut cesserit creditoribus omnia bona, quae tum temporis habuit: alioquin debitor tantum indicans bonorum partem, et partem celans, indignus redditur hoc beneficio, siquidem ex malignitate et dolo celans partem non satisfecerit legi requirenti omnium cessionem (…).*

64 A. Perezius, *Praelectiones*, ad C. 7.71, p. 682, nr. 6: *Sunt et alii qui etsi maxime velint, tamen non possunt bonis cedere, veluti qui in fraudem creditorum bona alienarunt, aut dissiparunt, nemini enim fraus et dolus parrocinari debet.* Afterwards, Perez made – with reference to Bartolus – a distinction between immovable goods that could be revoked easily and movables, a return of which would cause many practical difficulties.

65 H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 795, nr. 7-8: *Non est autem omnibus necessaria ista cessio. Non militi, quia cum conveniri non possit ultra, quam facere potest (…) ex ratione, ne cogatur deserere militiam, bonis cedere non cogitur. Quod beneficium et Clerico indulgendum videtur, qui executionem non patitur ultra, quam facere potest, ut (…), ex ratione, ne avocetur a divinis. Si tamen cedere velit, non videtur impediendus, arg. [D. 42.3.9], ubi mulier potest bonis cedere, licet in carcerem detrudi nequeat propter debitum civile (…).*

66 Antonio Perez was born in Alfaro (Aragon) in 1587 and came to Leuven as a child. He became a *regius* professor of the Institutes and as of 1628 *ordinarius* of the second chair. His works on administrative law were very influential. See for a short overview: L. Waelkens, "Chapter 3: The Seventeenth Century: An

obliged to desert. Clerics who had to cede all goods, could discredit the Holy Church.[67] Even though in both cases the argumentation seems to have been primarily aimed at the defense of the public good, one could argue that having a certain status or dignity within society led to the relaxation of one's obligations under the *cessio bonorum*.

Argument 3: Relaxation of obligations because of the necessary reverence – A third argument is linked to the second one, as it also entails a relaxation of obligations under the *cessio bonorum*. A wife could not force her husband to a complete *cessio bonorum*. The same was true for claims by a son to his father, by a daughter-in-law to her father-in-law, by a beneficiary to a donator, by a partner to another partner.[68] Although the exact reason for this was not always mentioned, it is very probable that the duty of reverence was of primary importance, as we can read, for instance, in the works of the influential French author Hugo Donellus (1527-1591).[69]

Argument 4: Purpose of shame practices at the occasion of a cession of goods – *Cessio bonorum* was a favour in order to avoid a defamatory imprisonment, but entailed some shaming sanctions itself. This strengthening of the *ius commune* regulations wanted to discourage an excessive use of *cessio bonorum* (*ne tam facile ad eccessionem convolent*), which should remain a last resort.[70] In some places, for instance in Saxon practice, those shame sanctions were however considered as an alternative redemption of the debt, as the Wittenberg professor of Antwerp origin Matthias van Wesembeke (1531-1586) argued.[71] Such an opinion was shared by Simon van Groenewegen van der Made (1613-1652), Simon van Leeuwen (1626-1682) and

Old Law Faculty for a New Age" in L. Waelkens, F. Stevens and J. Snaet (*eds.*), *The History of Leuven's Faculty of Law*, Bruges, die Keure, 2014, (91) 108-109.

67 A. Perezius, *Praelectiones*, ad C. 7.71, p. 682, nr. 4 : *debet ei* (i.e. clerico) *relinqui unde vivere possit, ne propter mendicitatem et inopiam alimentorum convertatur, in contumeliam ordinis Ecclesiastici, ad turpia lucra, ad quae paupertas cogit*. In France, clerics, magistrates and lawyers (*avocats*) were apparently exempted from shaming sanctions to avoid scandals: P. Zambrana Moral, "Histoire de six articles", (589) 594.

68 A. Perezius, *Praelectiones*, ad C. 7.71, p. 682, nr. 5: *Plane neque aliis, quibus est idem beneficium competentiae datum, necessaria est haec cessio, veluti marito, qui non convenitur ab uxore in plus quam facere potest, uti nec socer a nuru, pater a filio, donator a donatario, socius a socio (…).*

69 H. Donellus, *Donellus enucleatus, sive commentarii (...) de iure civili in compendium ita redacti, ut verum nucleum contineant, ...*, Antwerpen, apud Petrum Bellerum, 1642, lib. 27, cap. 9, p. 426: *Tribuitur enim hoc beneficium aut iis qui sanguine coniuncti (...) aut per matrimonium. (...) Etsi enim marito ob reverentiam illi debitam tribui dicatur, (...) Quibus autem ob reverentiam datur, marito, socero etc., hi nec per pactum renunciare possunt. (...)*

70 H.J. Zoesius, *Commentarius in Codicem*, ad C. 7.71, p. 490, quaestio 1: *(...) cum ignominia qua affectus ex speciali loci statuto non adhibeatur in compensationem debiti, sed ne tam facile, ad eccessionem convolent (...).* See also: P. Gudelinus, *Commentariorum*, liber IV, cap. XVI, p. 187: *(...) tamen ne facile cum pernicie creditorum ad cessionem confugeretur, more quorundam locorum comparatum est hanc fieri cum quadam solemnitate actus ignominiosi.*

71 M. Wesenbecius, *In Pandectas Iuris Civilis et Codicis Iustinianei Libros Commentarii, olim Paratitla dicti*, Mainz, Balthasarus Lippius, 1608, 358-359, nr. 3. Matthias van Wesenbeke had studied law at the university of Leuven from 1545 to 1550. Gabriel Mudaeus was one of his teachers.

Antonius Matthaeus III (1635-1710), all three learned jurists from the United Provinces.[72] The aforementioned Leuven professor Hendrik Zoesius disagreed.[73]

Argument 5: Respectable people can get out of financial problems, can't they? – *Cessio bonorum* as a favour also implied the prior fulfilment of some conditions. In case of bad faith by the debtor, no cession of goods could take place. When applying this rule to concrete situations, arguments of humanity or respectability were used. Thus, the German jurist Ulrich Zasius (1461-1536) wrote that a debtor who contracted new debts, although he knew that he wasn't able to pay them back because of his insolvency at that point, did not act in bad faith, if he was really convinced that by his tough work (*industria*) he would be able to pay back later. Indeed, Zasius thought of some very respectable persons who succeeded in paying their debts, even though they were not able to do so at the moment of the contract.[74] The Frankfurt jurist Johann Fichard (1512-1580) disagreed. The latter opinion was followed by Hendrik Zoes: if the debtor had contracted the debt when he was already insolvent, he acted maliciously and in bad faith. The same was true, if he became prodigal.[75]

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[72] S. van Groenewegen van der Made, *Tractatus de legibus*, ad D. 42.3.6, p. 292: *Illa autem bonorum cessio, quae ex quorundam locorum statutis fit cum quadam actus ignominiosi solennitate, plenissimam debitori liberationem parit (…).* S. van Leeuwen, *Het Rooms-Hollands-Regt* …, Amsterdam, Boom Bockverkopers, 1708, boek 4, deel 41, p. 492, nr. 3: *Dese Boedel afstand gedaan zijnde, werden de schulden daar mê niet geheel gedood; maar indien den Schuldenaar daar na enige middelen bekomt, is hy schuldig betaling te doen, so veel als hy boven sijn nooddruft kan by brengen. (…) Uitgesondert so wanneer als hy boven de willige afstand eenig schandaal heeft moeten lijden, in welk geval hy verstaan werd 't eenmaal bevryd te zijn. (…)* A. Matthaeus, *Observationes rerum judicatarum a supremo Ultrajecti revisionis consessu*, Leyden, Arnold Doude, 1673, *obs.* 26, p. 137, nr. 6: *Quod autem jam dixi, quod cessio debitorem, qui cessit, non liberat, id opinor verissimum, nisi cedens praeterea cum quadam ignominia sit dimissus, ut fit ex quorundam statutis.* All three authors founded their claim with a reference to Guido Papa (d. 1477) and Petrus Gregorius Tholosanus (1540-1597), both French jurists.

[73] H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 797, nr. 21: *An per ejusmodi modum cedens liberetur ab excurrenti debito, ubi pervenerit ad pinguiorem fortunam? Asserit hoc Menochius (...) et Guido Papa (...) ex ratione, quod ista ignominia, quae est quaedam poena corporalis, sit loco pecuniarii debiti (...). Verum ea ratio non videtur procedere, quod per cessionem nec naturalis, nec civilis tollatur obligatio, et ista ignominia, sive actus ignominiosus, non tam adhibeatur in compensationem debiti, quam ne quis facile ad cessionem faciendam convolet, in detrimentum et perniciem suorum creditorum; unde cum ad illum effectum tendat, non debet alium operari.*

[74] U. Zasius, *Responsorum iuris civilis libri II*, Leiden, Antonius Vincent, 1545, II, cap. IX, p. 188, nr. 6: *Sed evidentia facti constat, quod debitor potest esse non solvendo, et tamen bona fide contrahere, sperans per suam industriam futurum ut efficiatur dives, id quod ego in multis spectabilibus personis vidi (...).*

[75] J. Fichardus, *Consilia duobus tomis olim distincta*, Darmstadt, Henningus Müller, 1677, II, *cons.* 32, p. 156 (15 juli 1549): *Prima, quod debitor ad cessionem non admittatur, si (...). Secunda, si debitor contraxerit debitum eo tempore, quo scivit se non esse solvendo. Tertia, si debitor spe et animo tandem, cum nihil supersit, cedendi contraxerit; neque enim tum ad cessionem admittitur*. See, in the Low Countries also: H. Zoesius, *Commentarius ad Digestorum*, ad D. 42.3, p. 796, nr. 11: *quibus* (namely those who could not use the *cessio bonorum*) *adde eum, qui spe et animo cedendi contraxit, ne lex videatur fovere malitiam.*

Such *decoctores* were in fact thieves and deserved a prison sentence[76], according to some royal ordinances even a death penalty by hanging (*laqueo puniendos*).[77] By the way, such a view was widespread in the early modern period and also present in the English debates. Richard Dane, for instance, formulated it in his address to the English parliament around 1590 as follows:

> "*These Banckrowts are worse than theves [that] robbe by the highe waye for necessitie: but these are duble theves becawse they were put in trust with many mens goods: which by breking they undoe many.*"[78]

Argument 6: *Cessio bonorum* benefits all creditors, also the non-aggressive ones – A sixth argument concerns the fair treatment of all creditors, including those who – out of good manners – had not acted immediately against their debtors. It is taken from one of the civil consultations by Jean de Waimes (Wamesius, 1524-1590), another 16th-century professor at the Leuven university.[79] Wamesius stressed that a *cessio bonorum* should benefit all creditors. Otherwise, such a technique would cause an indignation of the creditors who had been

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[76] A. Perezius, *Praelectiones*, ad C. 7.71, p. 682-683, nr. 8 : *quos tanquam fures comprehendi et carcere detineri donec satisfecerint creditoribus suis, jubet Caroli V Imper. constitutio, lata in comitiis habitis Augustae Vindelicorum* (= Augsburg), *art. 22*.

[77] D. Tuldenus, *Commentarius* II, ad D. 42.3, p. 562, caput 2, nr. 5: *Hoc amplius Edictis 7. Oct. 1531 et 4 Octob. 1540 decoctores proprie dictos non tantum a beneficio cessionis exclusit, sed et tanquam fures manifestarios laqueo puniendos, summaria cognitione interposita, nulla immunitate attendenda, declaravit (…)* Van Tulden refers to the edicts of 7 October 1531 and 4 October 1540. See: Ordonnance (7 October 1531) sur l'hérésie, les monnaies, la redaction des coutumes, les notaires, les monopoles, les banqueroutiers, etc., in M.J. Lameere, *Recueil des ordonnances des Pays-Bas. Deuxième série – 1506-1700*, vol. 3, Brussels, Goemaere, 1902, p. 267: *Et pour remede contre les banqueroutes, nous avons statue et statuons que tous marchans et marchandes et autres quelzconques personnes soy entremettans du fait de marchandise, lesquelz frauduleusement et par dol emporteront largent, les marchandises ou les debtes dautres marchans ou dautres personnes, et lesquelz lon dit bancqueroutes, soyent et seront tenuz et reputez pour larrons publiques (…)* See also: Edit (4 October 1540) de L'Empereur, concernant les sectes et hérésies, les banqueroutiers, les monopoles, les monnaies, les contrats de mariage des commerçants etc., in: M.J. Lameere and H. Simont, *Recueil des ordonnances des Pays-Bas. Deuxième Série – 1506-1700*, vol. 4, Brussels, Goemaere, 1907, p. 233: *(…) wy (…) hebben geordonneert ende gestatueert, ordonneren ende statueren dat alle coopluyden ende coopvyven ende andere schuldenaers, van wat conditie ende qualiteyt sy syn, die hen absenteren sullen van de leste plecke van huere residentie sonder betalen oft vernoughen hunner crediteurs, ende heymelyck transporteren oft verswygen sullen huerlieder goeden om de selve te bedriegen, sullen gehouden ende geacht worden voor openbaere diefven, als straet schenders ende vianden van der gemeyne welvaert, (…) ende dat na dat sy die geapprehendeert sullen hebben, dat sy tegens hen procederen sommierlyck sonder figure van processe, ende dat de richters voor de welcke sy luyden geaccuseert oft beticht sullen wesen (…), die condempneren ter doot mitter coerde sonder verdrach, faveur oft dissimulatie, (…).* In practice, one didn't go so far, certainly not in Antwerp: D. De ruysscher, "Bankruptcy", (185) 193.

[78] R. Dane, "Address to Parliament on the Mischiefs Arising from Bankrupts Concealing Their Effects; with the Means of Addressing the Grievance (circa 1590), British Library, Landsdowne MS 99 f. 185r., as quoted by: E. Kadens, "The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law", *Duke Law Journal* 59 (2010), (1229) 1238-1239.

[79] Wamesius was born in Liège and is especially known for his volumes of civil and canonical consultations. See, for a general overview on his commercial practice: A. Wijffels, "Wamèse, la pratique du droit commercial dans l'oeuvre d'un professeur louvaniste" in X., *Liber Amicorum Guy Horsmans*, Brussels, Bruylant, 2004, 1151-1175.

ignored. In the case under discussion, Wamesius considered the unfair treatment to be so revolting that even the presumption of good will in a virtuous and honourable person could not be upheld. The fact that not all creditors had immediately taken judicial actions did not make any difference: it would even testify to a subversive cupidity (*incivilis cupiditas*)[80] to immediately at the smallest sign of financial distress summon their debtors.[81] Nevertheless, at that time it was still common usage in cities to give preference to those creditors who had first seized the goods of the debtor[82], according to a first-come first-serve principle, at least after the privileged creditors had been paid.[83]

Argument 7: *Cessio bonorum* of all goods, or could exceptions for humane reasons be allowed? – Seventhly, discussion existed as to whether a ceding debtor could retain some goods, and if so, which ones and how many. In principle, an insolvent debtor had to list all his possessions and cede them all without exception.[84] According to the classical *ius commune* theory cited by Matthias van Wesembeke a debtor was only allowed to retain his underwear.[85] Hendrik Zoes excluded maintenance allowances at this stage of the procedure.[86]

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[80] One could also translate *incivilis cupiditas* as an action which was not required by civil law.

[81] Ioannes Wamesius, *Responsorum sive consiliorum ad ius forumque civile pertinentium, centuria quarta, ordine titulorum Pandectarum et Codicis digesta*, Leuven, apud viduam Henrici Hastenii, 1632 (hereafter: Wamesius, *Responsorum* IV), cons. 63, additio, p. 216, nr. 27: *Negligentes non esse tradit tam Fulgosius, quam Angelus, non tantum qui exactionis aliquam diligentiam faciunt, verum etiam eos, qui inciviliter statim non petunt; nam qui id faciunt in contrario vitio incivilis cupiditatis constituuntur.*

[82] *E.g.* in Brussels customary law, especially with regard to non-bankrupt debtors, see: D. De ruysscher, "Designing the limits", (307) 319. After bankruptcy, no preference was attributed any longer. See: Title 9, §62 Coutumes de la ville de Bruxelles in A. De Cuyper (*ed.*), *Coutumes du pays et duché de Brabant. Quartier de Bruxelles*, vol. 1, Brussels, Gobbaerts, 1869, p. 26: *(…) nae de grootte ende advenant van heure schult, sonder preferentie, niettegenstaende dat eenighe van de voorscreven crediteuren den anderen geprevenieert mochten hebben arrest te doene op de goeden van de bancquerouten (…)*. As to non-bankrupt debtors, §63 adds: *Maer aengaende der preferentie ende concurrentie van andere persoonen egeen bancquerouten wesende, worden geprefereert : (…) arresten in heure ordene ende beleyden, ende dat soe verre 'tgoet van den debiteur hem streckt.*

[83] D. De ruysscher, "Bankruptcy", (185) 190-192; D. De ruysscher, "Designing the limits", (307) 312.

[84] G. Dyemenus, *Ad regulas iuris Romanorum antique notae*, Leiden, Ludovicus Elzevier, 1616, p. 390, nr. 8: *Ex his facile intelligimus, beneficium hujus Regulae longe esse uberius beneficio bonorum cessionis. Nam bonis suis cedenti totum aufertur: tantum hoc consequitur, ne in carcerem detrudatur (…).* Willem Van Diemen (1508-1583) studied law in Leuven and Orléans and was the president of the Court of Utrecht for some time.

[85] M. Wesenbecius, *Responsorum sive consiliorum, quibus gravissimae Iuris utriusque controversiae deciduntur, pars I*, Frankfurt, Sigismund Latomus, 1600 (hereafter: Wesenbecius, *Responsorum* I), cons. 50, p. 781, nr. 17: *Etenim licet semel excussus debitor illud beneficium habeat, ut amplius excuti nequeat, nisi quatenus facere possit (…), hoc est, deducto ne egeat, (…), secus tamen est in priore cessione, ut recte distinguit Campez (…), ubi debitor ad ultimum usque denarium excutitur, et sua creditoribus relinquere ac cedere cogitur (…), atque adeo usque ad intimam excutitur interulam, ut ait Baldus (…).*

[86] H.J. Zoesius, *Commentarius in Codicem*, ad C. 7.71, p. 490-491, quaestio 2: *(…) cum alimenta tantum concedantur, quoad ea quae post cessionem accedunt*. For the newly acquired goods which a debtor could retain, see *supra*, section B.

Nevertheless, some distinctions were made in practice. Pieter Peck the Elder made an exception for the necessary daily clothing: these, a debtor could retain.[87] Pieter Van der Aa (1530-1594), another Leuven law professor, agreed and expanded a little bit on what kind of clothing could be kept. He argued that it should be simple clothing, but to define this concept he also referred – led by considerations of humanity (*humanitate ductus*) – to the societal status and dignity of the debtor concerned.[88] Still in the seventeenth century, Antonio Perez ascribed this indulgence of daily clothing to a *ratio humanitatis*, because nudity was considered indecent (*cum turpis sit nuditas*). Contrary to van der Aa, Perez did not explicitly consider the societal status of the debtor.[89]

The question which cloths could be retained by the ceding debtor was one of the central issues in a consultation by the Utrecht lawyer Arnoldus Matthisius (d. 1666). An insolvent debtor had personally deposited a letter of cession before the city court of Utrecht, but at that time he was wearing a somewhat more precious robe, a coat, a hat, stocking and shoes. As those were his only clothes, Matthisius claimed that the debtor, his client, was honestly convinced that he was allowed to keep them. Once he heard that the court did not grant him the benefice of cession because of those cloths, he could therefore validly refile his petition, if he offered those cloths as well.[90]

Besides, humanitarian reasons were not the only ones taken into account. Economic considerations led Gaill, for instance, to also exempt tools and implements from confiscation.[91] Such a provision enabled the debtor to more easily acquire new goods and, thus, to better meet his financial responsibilities towards his former creditors.

Argument 8: Feudal goods: legal inalienability and impact on *cessio bonorum* – An eighth argument is derived from feudal law. Feudal goods did not fall under the *cessio*

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87 P. Peckius, *Tractatus de iure sistendi*, 247, cap. 42, nr. 19: *his solis, quae ad necessitatem vestiendi pertinent, exemptis*. Such reasoning was also applied in Augsburg. A mid-16th-century hand-written plea by lawyers of the commercial family Weyer from Augsburg referred to the fact that these debtors should be left only with their bad clothes (*allein jn jren schlechten klaidern davon zue gehen*). Quoted by: S. Birnbaum, *Konkursrecht der frühen Augsburger Neuzeit mit seinen gemeinrechtlichen Einflüssen* [Augsburger Schriften zur Rechtsgeschichte 24], Münster, LIT, 2014, 43.

88 P. Vanderanus, *De privilegiis creditorum commentarius*, Antwerp, Johannes Bellerus, 1560, 140-141. It wasn't, however, anything more than just simple clothing: *(…) non permittimus autem debitori pretiosiorem vestem, quin etiam si quae sit detrahi eam, vilioremque eius loco subrogari a creditore concedimus, cum hic necessitatis ratio in tegendo corpore nulla sit. Velimus tamen hic, humanitate ducti, aliquam dignitatis et personarum rationem haberi.*

89 A. Perezius, *Praelectiones*, ad C. 7.71, p. 684, nr. 18: *Ratio tamen humanitatis vult, ut cedenti relinquantur vestes quotidianae, quas defert secum dum cedit, ne nudus incedat, quemadmodum et damnato ad mortem. (…) Et haec est communis opinio quam probat Cynus (…), quia nec in obligationem generalem censetur venire vestis (…), si debitor carcere concluderetur, relinqueretur ei vestis, cum turpis sit nuditas.*

90 X., *Utrechtsche consultatien …*, vol. 2, Utrecht, Rudolph van Zyll Boeckverkooper, 1684, *cons.* 92, p. 401-405, esp. 402-403. No date is mentioned in the consultation, but it probably dates from the mid-17th century.

91 See also: A. Gaill, *Practicarum observationum*, *Lib.* II, *Obs.* XXV, p. 326: *Sed in generali obligatione bonorum, non veniunt ea, quae quis in specie verisimiliter non esset obligaturus: qualia sunt ea, quae in usu quotidiano necessaria, item libri Doctorum, et instrumenta artificum, atque opificum, et similia. (…) Fallit, si nuncupatim huiusmodi bona in obligatione generali comprehensa sint.*

bonorum, simply because the debtor was not able freely to dispose of these goods. Here, no humanitarian reasoning was invoked. Nevertheless, respect for the other family members and for the feudal overlord will have been at the basis of this consideration. Thus, in his 50th printed *consilium*, Wesenbecius strongly emphasized that point: insolvency should not prejudice the family members and, especially, must not burden the feudal lord with a worse or less capable vassal (*alium vasallum, et saepius minus dignum*). Only the revenues during the lifetime of the debtor had to be ceded, nothing more.[92]

Argument 9: Renunciation of the *beneficium cessionis*: private slavery? – A ninth argument concerns the question whether or not a debtor could renounce the favour of cession of goods. Some *ius commune* authors only considered such a prior renunciation as a small, non-considerable limitation of the debtor's freedom. Moreover, such a measure would increase confidence in commerce.[93] According to the unanimous opinion of Netherlandish learned lawyers, however, a pact between creditors and the debtor by which the debtor renounced his *beneficium cessionis* would violate public order and good morals, in that it would give rise to a kind of private slavery, marked by its rough and inhumane character.[94] Even in case this renunciation had been done by oath, Paul van Christijnen (Christinaeus,

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[92] M. Wesenbecius, *Responsorum* I, cons. 50, nr. 13: *Constat autem in his Curiis et iudiciis, quibus dicta feuda comitatus subiecta sunt, item in regionibus, ubi illa sunt sita, de notoria consuetudine fieri executionem ad solvenda debita, tantum quoad fructus feudorum ad vitam debitoris, nec etiam – nisi omnibus, quorum interest, consentientibus – propterea vendi feuda ipsa et alienari cum iniuria non solum domini, qui cogeretur alium habere vasallum, et saepius minus dignum.* Wesenbecius was treating there the famous Mansfeld-case. This rich Bavarian noble family experienced extremely bad financial problems in the 1560s. Despite all Wesenbecius' efforts, they finally lost most of their feudal possessions. See, for instance: H.J. Zoesius, *Commentarius in Codicem*, ad C. 7.71, p. 491, *quaestio* 4: *An bonis Creditor cedere debeat alienari prohibitis? Respondeo: Videri, quoad usum eorum cedere debere, pro sua vita (…).*

[93] A. Perezius, *Praelectiones*, ad C. 7.71, p. 684, nr. 20: *Quaeritur utrum valeat pactum per quod debitor renunciat beneficio cessionis. Et plures DD. tenent valere, prout asserit Matthaeus Brunus (...). Moventur per regulam (...) quod quis potest renunciare beneficiis pro se introductis: item quod debitor possit renunciare tacitae cessioni (...). Si videlicet acceperit dilationem quinquennalem, qua elapsa ad bonorum cessionem amplius non admitti videtur. Praeterea hoc pactum, ne quis beneficio cessionis utatur, dicunt non esse contra bonos mores, nec adversari juri publico, sed potius illud vergere ad fidem commerciorum conservandam, atque hanc sententiam videtur approbasse Covarruvias (...) et Vasquez (...).* The reference to Covarruvias seems problematic, as he would have argued that in some cases, argumentations of justice could prevail. Earlier, especially the Italian jurist Jacobus de Arena seems to have been promoting the freedom to renounce this benefice: W. Forster, *Konkurs als Verfahren*, 187-188.

[94] A. Perezius, *Praelectiones*, ad C. 7.71, p. 684-685, nr. 20: *At contraria opinio probabilior est, confirmatur senatus-consultis, non valere huiusmodi pactum, quia nimis asperum et inhumanum, restringens jus libertatis restringitur enim naturalis libertas, si quis semper cogatur esse inclusus in carcere (…).* A free man must not become a slave because of overindebtedness: G. Mudaeus, *De contractibus*, III, § *Cum eo quoque*, p. 640, nr. 5 : *Et certe longe adhuc inhumanius, quod servatum fuit antiquitus (...) et in nostris legibus, quod ob aes alienum, liber homo servire non debeat.* See also: H.J. Zoesius, *Commentarius in Codicem*, 490-492, *quaestio* 9: *(...) repugnans pactum affectui humanitatis, et bonis moribus contrarium dicatur*. *Cfr.*: D. Tuldenus, *Commentarius* II, ad D. 42.3, p. 563, caput 3, nr. 1: "*bonis moribus et humanitati contrarium*". If this renunciation would have been done by taking an oath, Perez argued that it was not up to the debtor to plead for another measure. Nevertheless, the creditor would act in an unfair and inhumane manner if he would ask for forced execution. A. Perezius, *Praelectiones*, ad C. 7.71, p. 685, nr. 21: *Verum licet servari posset a debitore,*

1543-1631)[95] argued in his first printed volume of *decisiones* that a debtor could still cede his goods, if necessary even without previous absolution, albeit only according to the shameful procedure.[96] A consultation from 9 March 1622, written in a case which was pending before the Council of Utrecht, repeated this principle and added that no one could be bound by a promise of perpetual imprisonment.[97]

Argument 10: Shaming sanctions by creditors suppressed – Finally, to emphasize the close relationship between the discourse of honour and insolvency, an observation of Andreas Gaill deserves attention, even though it is not directly related to a *cessio bonorum*. Apparently, very often creditors published and distributed notorious pictures of defaulting debtors. The non-observance of one's obligations must have been a very sensible issue. As the princes were convinced that these pictures caused scandals, homicides, thefts and illegal wars, they decided to prohibit this practice.[98]

E. Conclusion

Sources – At the end of this paper, some concluding remarks can be made. *Cessio bonorum*, cession of goods, was a debated issue in 16th- and 17th-century learned legal literature. As to the sources, it should however be remarked that most references had to be taken from learned legal commentaries, as well as – albeit to a somewhat lesser extent – from collections of *decisiones*. Efforts to find discussions on this topic in Dutch *consilia* literature have been quite unsuccessful. References to the *cessio bonorum* in those consulations were indeed rather

occurrit tamen quaedam iniquitas et inhumanitas ex parte creditoris, hujusmodi juramentum extorquentis, quae facit, ut vis juramenti debilitetur, et petatur illius relaxatio.

[95] Paul van Christijnen was a *pensionaris* at the city of Mechelen and lawyer at several princely courts. See for some comments on Christinaeus' volumes of *decisiones*: A. Wijffels, "Van Paul van Christijnen (1631) tot Jean-Alphonse de Coloma (1739): rechters en advocaten bij de Grote Raad van Mechelen tegen de achtergrond van de zeventiende-eeuwse Europese rechtsontwikkeling", *De zeventiende eeuw* 9 (1993), (3) 11-12.

[96] P. Christinaeus, *Practicarum quaestionum*, *dec.* 228, p. 390, nr. 8: *(…) tamen cum sit contra bonos mores quo casu iuramentum non est obligatorium, (…) etiam non obtenta absolutione iuramenti, teste Guidonis Papae (…), videtur admittendus debitor ad cessionis beneficium, salvo tamen quod ea fieri debeat ignominiose (…) et ita aliquando censuit noster Senatus; cessio enim probrosa et ignominiosa solutionis et poenae corporalis loco est (…).*

[97] The consultation is signed by the Utrecht lawyers Johannes Sarcerius and G. Cuylemburg, see: X., *Utrechtsche consultatien …*, vol. 2, Utrecht, Rudolph van Zyll Boeckverkooper, 1684, *cons.* 91, p. 385-386: *Hier benevens staet te considereren dat beneficium cessionis quod miserorum est refugium, soo favorabel is, dat de rechten niet toe en laten dat ymand 't selve beneficie mach te buyten gaen, of daer van renuncieren uti decisum dicit Guido Papa (…). Want terwijlen notoir is quod nemo est dominus membrorum suorum, ende dat mitsdien niemant hem en mach obligeren ad perpetuos carceres (…), quodque impossibilium nulla sit obligatio.*

[98] A. Gaill, *Practicarum observationum*, *Lib.* I, *Obs.* X, p. 23: *Consueverunt enim creditores, morosos debitores ex pacto et conventione, famosis picturis traducere, easque picturas publice proscribere; unde scandala, homicidia, latrocinia, et nonnunquam bella illicita sequuntur: quibus Imperator mature et sollicite obviare debet (…).*

scarce, especially in the Southern Low Countries.[99] This might be explained by the high costs, which were often related to the advice of a distinguished lawyer and university professor.

Usage and meaning of shame, dignity and humanity – Running through the arguments, a few conclusions about the nature and meaning of shame, dignity and humanity in those debates can be proposed.

First, the shaming sanctions, causing *infamia facti*, *pudor* and *ignominia* seemed to have aimed primarily at causing reputational damage by making it public that a certain debtor was not to be trusted. This was of course extremely important for merchants[100], but will have entailed difficulties for other insolvent debtors too. The same can be said of Gaill's remark that the prison was to be considered a shameful mansion.[101] Other people would know you were in prison and would take that fact into account in later dealings.

Secondly, the *dignitas*, the status a debtor had in the community played an important role, and – as it was common during the Ancien Régime – this mainly had to do with the debtor's belonging to the nobility, the clerical class or the active military.[102] People with a higher societal status were accorded *ipso facto* a higher amount of credibility and creditworthiness.[103] *Dignitas* as a noun was rarely used for people who didn't belong to those privileged classes of society.

In the third place, arguments of honour, dignity and respect did not stand alone. They were often accompanied by efficiency arguments, instrumental arguments so-to-say.[104] For instance, reference can be made to the soldier's or the cleric's privileges in order not to promote desertion or in order not to embarrass the Church[105], or to the argument on feudal goods and the avoidance of disadvantages to the feudal lords[106].

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99 Apart from the aforementioned reference to Wamesius, *cons. civ.* IV/58 and Wesembecius, *cons.* 50, only small references without relevance for the discussions on honour and dignity were found in Wamesius, *cons. civ.* IV/64 and I. Wamesius, *Responsorum sive consiliorum de iure pontificio tomus I ordine titulorum qui in Decretalibus digestus*, Leuven, Gerardus Rivius, 1605, *cons. can.* 122, p. 185-186. As a side remark, *cessio bonorum* was also mentioned in: E. Leoninus, *Centuria consiliorum*, Antwerp, Christoffel Plantijn, 1584, *cons.* 63, p. 284-287. The printed consultations from the Northern Low Countries were generally written by practical lawyers, not by university professors, and consequently probably less expensive. In this paper, reference was made to two Utrecht *consilia*: *cons.* II/91 and *cons.* II/92.

100 See, for a thorough study on the situation in England: C. Muldrew, *The Economy of Obligation. The Culture of Credit and Social Relations in Early Modern England*, Londen, Macmillan Press, 1998, 150-154. Precisely because one's credit depended so much on one's reputation and creditworthiness, people were in general very prudent to say bad things about their neighbours, because due to a chain reaction this neighbour's problems might seriously affect them in the end.

101 A. Gaill, *Practicarum observationum*, lib. I, obs. XXVI, p. 45 (in fact: 50), nr. 10.

102 In the Middle Ages, *dignitas* were already commonly linked to the social class one belonged to ('*Standeszugehörigkeit*'), see: A. Deutsch, "Ehre", *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 1, col. 1224-1231, www.HRGdigital.de/HRG.ehre (access: 1 September 2016), nr. IV.

103 P. Peckius, *Tractatus de iure sistendi*, p. 242, caput 42, nr. 10.

104 Kant and his theory concerning the non-instrumentality of human beings would only come into being in the 18th century.

105 See *supra*, argument 2.

106 See *supra*, argument 8.

Fourth, humane treatment as a universal value for all human beings, as we know it now, was not yet expressed in those documents.[107] Charity was shown only to those who in a non-fraudulent way were hit by insolvency problems. When someone was *indignus* because of his fraud, however, he did not deserve the benefice.[108] A more humane treatment of unfortunate debtors implied that the shame sanctions should not be too harsh (or could even be omitted) and that they should be left something to live, to cloth and to eat.[109] Especially, they should keep their civil status (*civitas*) to not become another man's slave.[110] Nevertheless, fraudulent debtors were excluded.

Finally, the tendency of these arguments was not univocal. Whereas the *cessio bonorum* was primarily meant to avoid the shame of prison, at the same time it entailed shaming aspects itself.[111]

Returning to prof. Whitman's article – On the basis of the 16th- and early 17th-century sources under review here, no unequivocal weakening influence of Roman law on the shame aspects of *cessio bonorum* in the Low Countries could be detected. Dave De ruyscher mentioned how the Antwerp 'cessie van goede', a local adaptation of the *ius commune*, had always entailed shaming practices.[112] Nevertheless, many learned lawyers did state that according to Justinian, a cession of goods by letters or proctors was valid, but that an *infamia facti* was in practice added to prevent abuse of the benefice of cession, thus suggesting that this additional shaming was at least not inspired by Roman law.[113] Some elements, like the references to canonists and to the decretal letter *Odoardus*, could point at a certain canon law influence.[114] More research is needed in that field.

Cessio bonorum today – Finally: sometimes, even today, *cessio bonorum* has a positive connotation, one of dedication and faith. Indeed, something which is called a *cessio bonorum* still exists as a legal institute, but in a completely different and often forgotten framework, namely the law of the Roman Catholic Church and with different consequences. New members of some religious orders freely choose to observe canon 668 of the *Codex Iuris Canonici* of

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107 See, for instance: O. Schachter, "Human Dignity as a Normative Concept", *American Journal of International Law* 1983, 848-854.

108 See *supra*, argument 1, *in fine*.

109 See *supra*, argument 7.

110 See *supra*, argument 9.

111 See *supra*, arguments 1 and 4.

112 Earlier, Whitman's position had been criticized by: D. De ruysscher, "Reconciling Old and New", (35) 48, footnote 48.

113 See *supra*, part C on shaming sanctions, especially the first paragraph, with further references. For such an explicit comment, see: P. Gudelinus, *Commentariorum*, liber IV, cap. XVI, p. 187: *(…) quinetiam singulare est moribus, ut diploma Principis cessionis faciendae caussa impetrari necesse sit; idque solemniter in judicio comprobari, de quo tenemus in his regionibus Caroli Quinti piae memoriae, constitutionem, licet jure Romano sufficeret sola voluntatis professio, possetque cessio etiam extra judicium fieri; et per nuntium vel epistolam.*

114 See, for instance: Ioannes Wamesius, *Responsorum* IV, cons. 63, additio, p. 216, nr. 27, with references to Fulgosius and Angelus. For an introduction to the debates on X. 3.23.3, *Odoardus*, see: W. Forster, "Et est casus singularis", 173-186. Pakter stated: "*Canon law probably hastened acceptance of* cessio bonorum *in all courts.*" See: W. Pakter, "The Origins of Bankruptcy", (485) 492-493.

1983.[115] In accordance with their vow of poverty, some nuns and monks cede all their goods (often to their monastery), so that they can live a poor and fraternal life together. It is the story of how a shaming institute became an honorific one.

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[115] Can. 668 CIC/1983: §1. *Sodales ante primam professionem suorum bonorum administrationem cedant cui maluerint et, nisi constitutiones aliud ferant, de eorum usu et usufructu libere disponant (…).* §4. *Qui ex instituti natura plene bonis suis renuntiare debet, illam renuntiationem, forma, quantum fieri potest, etiam iure civili valida, ante professionem perpetuam faciat a die emissae professionis valituram. (…)* §1 concerns a cession of the administration of one's goods, §2 is a full renunciation of those goods.

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